PUBLIC SERVICE COMMISSION OF THE DISTRICT OF COLUMBIA
1325 G STREET N.W., SUITE 800
WASHINGTON, D.C. 20005

ORDER

December 11, 2015

FORMAL CASE NO. 1119, IN THE MATTER OF THE JOINT APPLICATION OF EXELON CORPORATION, PEPCO HOLDINGS, INC., POTOMAC ELECTRIC POWER COMPANY, EXELON ENERGY DELIVERY COMPANY, LLC, AND NEW SPECIAL PURPOSE ENTITY, LLC FOR AUTHORIZATION AND APPROVAL OF PROPOSED MERGER TRANSACTION, Order No. 18054

I. INTRODUCTION

1. By this Order, the Public Service Commission of the District of Columbia ("Commission")[1] denies the District of Columbia Public Power's ("DCPP") Motion for Reconsideration and Renewed Motion to Intervene.[2]

II. BACKGROUND

2. On April 30, 2014, Pepco Holdings, Inc. ("PHI") and Exelon Corporation ("Exelon") announced Exelon's purchase of PHI. PHI is the parent company of the Potomac Electric Power Company ("Pepco"), the electric distribution company that serves the District of Columbia ("District"). On June 18, 2014, Exelon, PHI, Pepco, Exelon Energy Delivery Company, LLC ("EEDC"), and New Special Purpose Entity, LLC ("SPE") (collectively, the "Joint Applicants") filed a joint application for approval by the Commission, pursuant to D.C. Code §§ 34-504 and 34-1001, for a change of control of Pepco to be effected by the merger of

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[1] Commissioner Joanne Doddy Fort did not participate in the vote on Order No. 18018 for which DCPP is seeking reconsideration; therefore, she did not participate in the vote on this matter.

[2] *Formal Case No. 1119, In the Matter of the Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction* ("*Formal Case No. 1119*"), Motion of DC Public Power for Reconsideration and Renewed Motion to Intervene, filed November 16, 2015 ("DCPP's Motion for Reconsideration"). That portion of DCPP's Motion for Reconsideration entitled "Renewed Motion to Intervene" is actually the subject matter of the Motion for Reconsideration. As such, there is no need to refer to the Renewed Motion to Intervene as a separate pleading or issue. Our discussion and conclusion with regard to DCPP's Motion for Reconsideration encompasses and applies to the so-called "Renewed Motion to Intervene."

PHI with Purple Acquisition Corp. ("Merger Sub"), a wholly-owned subsidiary of Exelon ("Joint Application").[3]

3. The Office of the People's Counsel is the statutory party of right to any Commission investigation,[4] and it participated as a party in this case. In addition, the Commission granted petitions to intervene of 11 other entities to participate as parties in this proceeding.[5]

4. The Commission convened four (4) community hearings seeking input from the public on the Joint Application. The hearings were held between December 17, 2014 and January 20, 2015, at various times and locations throughout the District of Columbia.[6] The Commission also held 11 days of evidentiary hearings from March 30, 2015 through April 8, 2015, and April 20, 2015 through April 22, 2015. On May 27, 2015, the record closed.[7]

5. On August 27, 2015, the Commission issued Order No. 17947, which denied the Joint Application and found that the proposed merger was not in the public interest.[8] On September 28, 2015, the Joint Applicants filed an Application for Reconsideration of Order No. 17947.[9]

6. On October 6, 2015, the Joint Applicants filed a Motion to Reopen the Record in *Formal Case No. 1119* to Allow for Consideration of a Nonunanimous Full Settlement Agreement and Stipulation.[10] The Joint Applicants reported:

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[3] *Formal Case No. 1119*, Joint Application of Exelon Corporation, Pepco Holdings, Inc., Potomac Electric Power Company, Exelon Energy Delivery Company, LLC and New Special Purpose Entity, LLC for Authorization and Approval of Proposed Merger Transaction, filed June 18, 2014 ("Joint Application").

[4] D.C. Code § 34-804 (a) (2015).

[5] *Formal Case No. 1119*, Order No. 17597, rel. August 22, 2014 ("Order No. 17597"). The other parties are: Apartment and Office Building Association of Metropolitan Washington; the District of Columbia Government; D.C. Solar United Neighborhood; District of Columbia Water and Sewer Authority; General Services Administration; GRID2.0 Working Group, Maryland DC Virginia Solar Energy Industries Association, Mid-Atlantic Renewable Energy Coalition; Monitoring Analytics, LLC as the Market Monitor for PJM; National Consumer Law Center, National Housing Trust, National Housing Trust Enterprise Preservation Corporation; and NRG Energy, Inc.

[6] *Formal Case No. 1119*, Notice of Community Hearings, issued November 21, 2014; see also Vol. 68 No. 48 *D.C. Reg.*

[7] *Formal Case No. 1119*, Notice of Close of Record, issued May 27, 2015.

[8] *Formal Case No. 1119*, Order No. 17947, rel. August 27, 2015 ("Order No. 17947").

[9] *Formal Case No. 1119*, Application of the Joint Applicants for Reconsideration of Order No. 17947, filed September 28, 2015 ("Reconsideration Application").

[10] *Formal Case No. 1119*, Motion of the Joint Applicants to Reopen the Record in Formal Case No. 1119 to Allow for Consideration of Nonunanimous Full Settlement Agreement and Stipulation, or for Other Alternative Relief, filed October 6, 2015 ("Motion to Reopen").

> that extraordinary efforts have now yielded a Nonunanimous Full Settlement Agreement and Stipulation ("Settlement Agreement") joined by a broad cross-section of the parties to this case – specifically, the Joint Applicants, Office of People's Counsel ("OPC"), the District of Columbia Government ("DCG"), the District of Columbia Water and Sewer Authority ("DC Water"); the National Consumer Law Center ("NCLC"); National Housing Trust ("NHT"); the National Housing Trust-Enterprise Preservation Corporation ("NHT-E"); and the Apartment and Office Building Association of Metropolitan Washington ("AOBA") (collectively, the "Settling Parties").[11]

Among other things, the Joint Applicants requested "that the Commission toll consideration of the Application for Reconsideration . . . for such period of time as the Commission requires to fully consider the merits of the Settlement Agreement" and "toll the time for responses to the Application for Reconsideration."[12]

7. On October 16, 2015, DCPP filed an Opposition to the Motion to Reopen the Record and Notification of Intent to Acquire PHI's DC-Based Assets, as well as a Motion to Request Late Intervenor Status.[13]

8. In an Order issued October 28, 2015, the Commission granted the Motion to Reopen the Record in *Formal Case No. 1119* to Allow for Consideration of the Non-Unanimous Settlement Agreement and set forth in that Order the procedural schedule for doing so.[14] Resolution of, among other things, DCPP's Motion for Late Intervention was postponed until issuance of a later Order. That Order, No. 18018, issued on October 30, 2015, denied DCPP's Motion for Late Intervention.[15] DCPP filed its Motion for Reconsideration on November 16,

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[11] *Formal Case No. 1119*, Motion to Reopen at 1-2.

[12] *Formal Case No. 1119*, Motion to Reopen at 11, 13.

[13] *Formal Case No. 1119*, DC Public Power Opposition to Joint Applicants' Motion to Reopen the Record and Notification of Intent to Acquire PHI's DC-Based Assets, filed October 16, 2015 ("DCPP's Opposition"); and DC Public Power Motion to Request Late Intervenor Status, filed October 16, 2015 ("DCPP's Motion for Late Intervention").

[14] *Formal Case No. 1119*, Order No. 18011, rel. October 28, 2015. Prior to that Order, in the event the Commission determined to grant the Joint Applicants' Motion to Reopen, the Commission, on October 26, 2015, issued an Order tolling the deadline for action on the merits of the Application for Reconsideration and the filing of responses to the Joint Applicants' Application for Reconsideration until the Commission renders a decision on the Nonunanimous Settlement Agreement, or until the Commission determines otherwise. *See Formal Case No. 1119*, Order No. 18009, rel. October 26, 2015.

[15] *Formal Case No. 1119*, Order No. 18018, rel. October 30, 2015 ("Order No. 18018").

2015. On November 20, 2015, the Joint Applicants filed their Response in Opposition to DCPP's Motion for Reconsideration.[16]

III. DCPP'S MOTION FOR RECONSIDERATION

9. In light of the extraordinary length of DCPP's Motion for Reconsideration, in the interest of time and resources, we will address here only those arguments that we believe warrant discussion. Although some arguments have not been addressed, we have considered the contents of the entire Motion in rendering this Order.

10. In its Motion, DCPP disagrees with the Commission's denial of its Motion to Intervene on the grounds that "DCPP's interests concern matters that are outside the scope of this proceeding and that the Commission has reopened this record for a limited nature."[17] DCPP states that it's Motion to Intervene as well its Motion for Reconsideration cite "a number of issues in which its interests are involved that are at the heart of this proceeding and that pertain directly to the 'limited nature' of the reopened record."[18] DCPP alleges that "unless it considers the matters that DCPP seeks to raise, the record will be incomplete and a just result may not be reached.[19]

11. DCPP claims that it "meets fully the requirements of Rule 106."[20] It also states that "because the Commission inappropriately and narrowly denied its Motion to Intervene in its Order on Intervention, DCPP sets forth the grounds of its proposed intervention and its positions and interests more fully below [in its Motion for Reconsideration] than might otherwise be necessary."[21] According to DCPP, allowing it to intervene "will aid the record and help the Commission to reach a just result in accordance with the standards set forth in Order No. 17530," including "whether the proposed merger [transaction as modified] produces a direct and tangible benefit to ratepayers."[22] Further, DCPP argues that "denying intervention to DCPP, a potential competitor in the DC electricity market as well as a user and consumer of electricity from other sources, would deprive the record of evidence of alternatives against which Applicants' proposal must be judged and would be counter to Commission's established procompetitive policies."[23]

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16 *Formal Case No. 1119*, Joint Applicants' Response in Opposition to DC Public Power's Motion for Reconsideration and Renewed Motion to Intervene, filed November 20, 2015 ("Joint Applicants' Response in Opposition").

17 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 1, citing Order No. 18018 at ¶ 32.

18 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 1.

19 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 2.

20 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 2. Rule 106 (15 DCMR § 106) are the Commission's intervention rules.

21 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 2.

22 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 2, citing Order No. 17530 rel. June 27, 2014 at p. 10.

23 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 3.

12. Claiming its "unique status as a potential knowledgeable public power-oriented competing supplier of retail electricity and a consumer of electricity, DCPP argues that "no other party can represent its interests."[24] DCPP asserts that, without its participation, "the totality, as well as the details, of Applicants' new proposal (including a new regulatory asset account) may not be adequately qualitatively or quantitatively considered."[25]

13. DCPP raises five arguments to support its Motion for Reconsideration. First, DCPP asserts that unless DCPP's intervention is permitted, important public issues may be unaddressed.[26] DCPP alleges "that the Commission must find not merely whether the proposed Settlement is in the public interest but also whether the *acquisition itself as it is now proposed in its totality* is in the public interest."[27] In support of its position, DCPP cites to Commission Order No. 18011, which states: "[t]o be in the public interest in the context of this proceeding, the Settling Parties must show that the Proposed Merger as set forth in the proposed Settlement Agreement, *when taken as a whole*, is in the public interest under D.C. Code §§ 34-504 and 34-1001."[28] DCPP, asserting that it is uniquely situated to advise on the merits of any type of settlement and any alternatives to Applicants' revised proposal, argues that it "should be granted intervention because it can present evidence and argument on issues that will help determine whether the revised proposal meets this test."[29]

14. DCPP believes that it is crucial that the Commission "make an assessment of public benefits of the proposed non-unanimous Settlement Agreement."[30] DCPP asserts that if it was granted intervenor status:

> [I]t would provide testimony and analysis directly relevant to this matter addressing: the ability of the Commission to approve a rate increase outside of a Rate Case; the Commission's earlier determination that FC 1119 is not a Rate Case; the ability of the Commission to approve a new regulatory asset subject to a rate of return outside of a Rate Case; the ability of the Commission to approve an automatic rate increase without further review; the ability of the Commission to approve a rate increase of an indeterminate amount; the ability of the Commission to make a determination of public interest and/or public benefits when the amount, timing and duration of the automatically approved rate increase is unknown and undetermined; and, DCPP's earlier

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24 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 3.

25 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 3.

26 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 3.

27 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 4-5 (emphasis in the original).

28 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 5 (emphasis in the original).

29 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 5.

30 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 5.

> testimony that contained a cash flow analysis documenting the lack of any significant synergies from the proposed merger that could hold down or reduce the impact of future rate increases.[31]

DCPP adds that it would also provide testimony and analysis concerning the inherent conflict between FC 1119 and FC 1130, absent a divestiture of Pepco's DC-based assets. DCPP is also prepared to provide testimony and analysis illustrating the benefits of a divestiture of Pepco's DC-based assets.[32]

15. DCPP identifies a second threshold matter that it believes needs emphasis. According to DCPP, "the Attorney General and Office of People's Counsel, plus the District of Columbia Government, have not only settled, but have committed themselves to support the proposed Settlement filing."[33] DCPP claims that, although the Settling Parties "may argue that the Settlement represents their appropriate judgment, nonetheless the Settlement's consequence is that in presenting evidence and briefing, the Governmental settling parties are contractually committed to support it, regardless of new evidence, issues or considerations."[34] DCPP concludes that "if a question arises as to the adequacy of particular Settlement provisions, they cannot render an independent and impartial judgment that such provisions should be rejected or that further conditions are needed."[35] Under these circumstances, DCPP argues that its intervention is especially required to protect its interests and the public interest at large.[36] DCPP contends that the Governmental settling parties cannot be relied upon to safeguard the public in determining whether the Proposed Merger is in the public interest, and, thus, other parties must be relied upon to represent the public interest on issues that may be raised.[37]

16. DCPP's second argument to support its Motion for Reconsideration is that it has a cognizable interest in this proceeding.[38] DCPP points out that it has an office in the District of Columbia and "it uses electricity, a vital service to it, and will be affected by potential merger effects, including environmental impacts and reliability of service."[39] DCPP asserts that it "directly and tangibly will be affected by the merger and has an interest in this proceeding that can be represented by no other party."[40] DCPP also maintains that, in conjunction with its

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31 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 6.

32 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 6.

33 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 7.

34 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 7.

35 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 7.

36 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 7.

37 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 7-8.

38 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 9.

39 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 9.

40 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 9.

Motion to Intervene, it presented an alternative, potentially viable, substitute proposal to the purchase of Pepco by Exelon.[41] As a potential competitor and alternative supplier of electricity, DCPP believes that "it has an interest in future ownership and policies of the District's major or potentially sole utility."[42]

17. Third, DCPP claims it has an interest and entitlement to address alternatives.[43] DCPP alleges that "it is axiomatic that without considering alternatives to Exelon's control of Pepco and the proffered proposal, especially the kind of performance based benchmarks that DC Public Power can provide, the Commission cannot assess whether the revised acquisition proposal, and therefore the proposed Settlement, is in the public interest." [44] DCPP again contends that it "is in a unique position of being able to advise on alternatives and how well the Applicants' proposal compares to those alternatives."[45]

18. DCPP cites a litany of cases for the proposition that the Commission has an obligation to consider alternatives to the Nonunanimous Settlement Agreement, including *Motor Vehicle Mfrs. Assn. of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983) and *Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2nd Cir. 1965).[46] DCPP concludes that without a full consideration of the available options, any Commission decision in this case will lack legally required "substantial evidence."[47] According to DCPP, as a potential alternative supplier, it has a clear interest in this proceeding by having submitted an alternative proposal, and it maintains "an interest in the details of the Settlement proposal to ensure that they are pro-competitive and comport with the public interest."[48]

19. Its fourth argument in support of its Motion for Reconsideration is that DCPP has an interest in pursuing the revised filing's disabilities.[49] According to DCPP, "local distributed generation, micro-grids, and the shaping of customer electricity use are at the leading edge of electricity innovation from both cost and environmental standpoints."[50] DCPP believes that such new technologies are supported by District of Columbia policy as exemplified by District solar expenditures and renewable energy portfolio standards, and have begun to take root in the

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41 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 7, citing Order No. 18011 ¶ 32 and DCPP's Opposition, Appendix A.

42 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 10.

43 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 11.

44 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 11.

45 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 11.

46 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 11-19.

47 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 14, citing *Universal Camera Corp. v. NLRB*, 340 U.S. 474 (1951).

48 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 18.

49 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 19.

50 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 19.

District.[51] DCPP asserts that "it is noteworthy that Exelon owns the largest nuclear fleet in the country and is among the largest central station utility generators."[52] If Exelon's recently filed proposal is successful, DCPP believes there is danger that through Pepco or intermediate entities, Exelon will be able to shape distributed generation and load management policies to protect its central station generation.[53] According to DCPP, Order No. 17947 recognized the concern that, if permitted, Exelon control of Pepco may be used to protect against distributed generation competition.[54] DCPP states that extreme care is necessary in considering the revised proposal because these problems are built into the structure of the merger.[55] As a potential supplier of alternative generation that is knowledgeable in the area, DCPP seeks intervention to pursue these issues.[56]

20. DCPP asserts that Exhibit A also provides for an automatic rate increase to recover costs and a rate of return associated with a new regulatory asset that would be created representing certain deferred costs through 2019.[57] DCPP states that the new regulatory asset is to be subject to a 5 percent rate of return. DCPP also states "although automatic, the amount of the new regulatory asset and the amount and duration of the resultant rate increase is not specified."[58] DCPP adds, "nor is there a numerical cap."[59] Aside from the Commission's previous determination that *Formal Case No. 1119* is not a rate case, DCCP argues that "it is not possible to determine whether the public interest requirement has, can or will be met, or to make a calculation of financial benefits, without further examination analysis and testimony to discover the cost of the new regulatory asset and the impact of the automatic rate increase on residential ratepayers."[60] DCPP claims it is uniquely qualified to review and or prepare such analyses.

21. Finally, DCPP argues that intervention is justified at this time.[61] According to DCPP, Applicants' new and out-of-time proposal contains extensive changes from Exelon/Pepco's initial filing and extensive new (but not necessarily adequate) detail.[62] DCPP

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51 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 19, citing D.C. Code § 34-1432 (2015).

52 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 19.

53 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 19.

54 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 20 citing Order No. 17947 at ¶ 10.

55 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 20.

56 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 21.

57 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 23, citing Motion to Reopen at Exhibit A, ¶ 3.

58 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 23.

59 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 23.

60 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 23.

61 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 26.

62 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 26.

adds, "[a]s a matter of discretion, its new filing is being made in this Docket."[63] In this context, DCPP argues that its Motion to Intervene timely addressed Applicants' new filing.[64] DCPP asserts, "[r]econsideration of the denial of DCPP's motion to intervene is required because it would plainly abuse discretion and be in derogation of DCPP's process and substantive rights for the Commission to disallow DCPP intervention for timeliness or related reasons when it has just permitted Applicants to file their new acquisition proposal and case in this Docket."[65] DCPP contends that denying its intervention "would be unlawfully discriminatory and hold DCPP to an improper standard based on a failure to understand the inherent broad public interest inherent in DCPP's mission."[66]

22. Further, DCPP again points out that those on whom DCPP might otherwise have relied, including the D.C. Attorney General and Office of People's Counsel, plus the District of Columbia Government, have not only settled, but they have also committed themselves to support the Settlement filing.[67] Under these circumstances, DCPP argues that its Motion to Intervene is warranted to protect their interests and those of the public interest at large.[68]

IV. JOINT APPLICANTS' RESPONSE IN OPPOSITION

23. The Joint Applicants assert that the Commission should reject DCPP's Motion. First, the Joint Applicants maintain that "DCPP does not address the Commission's conclusions regarding the disruptive effects of post-settlement intervention *at all*, and so necessarily fails to identify any error in the Commission's decision."[69] The Joint Applicants state that DCPP's Motion "closes by asserting an 'entitlement' to seek intervention 'at this time' on the ground that the Settlement Agreement contains 'new and complex' conditions, and that certain parties that previously opposed the Merger now support it."[70] The Joint Applicants also state that "DCPP ignores what the Commission said on this very point: Settlements always contain new conditions, and always result in the settling parties dropping their opposition, yet the Commission's rules do not allow potential intervenors to sit on their hands and seek participation only after a settlement." According to the Joint Applicants, "the reasons behind this rule – avoiding unfairness to settling parties and preserving administrative efficiency – weigh particularly heavily against DCPP's request."[71] The Joint Applicants argue that "[t]here is no

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63 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 26.

64 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 26.

65 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 26-27.

66 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 27.

67 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 27 Motion to Reopen at Exhibit A, ¶ 134.

68 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 27 referencing *See Scenic Hudson Preservation Conference v. FPC*, 354 F.2d 608 (2d Cir. 1965).

69 *Formal Case No. 1119*, Joint Applicants' Response at 3 (emphasis in original).

70 *Formal Case No. 1119*, Joint Applicants' Response at 3-4.

71 *Formal Case No. 1119*, Joint Applicants' Response at 4, citing *Formal Case No. 1119*, Order No. 18018, ¶ 22, rel. October 30, 2015.

reason for the Commission to entertain DCPP's disruptive request after it took such care in Order No. 18011 to craft a specific procedural schedule aimed at ensuring 'issuance of a decision in a timely matter.'"[72]

24. Second, the Joint Applicants state that "DCPP at least *acknowledges* the Commission's finding that its 'conclusory' two-page Motion to Intervene failed to identify the required 'significant interest in the outcome of this proceeding,' but its 30-page Motion to Reconsider does not show any error in that finding."[73] The Joint Applicants summarize DCPP's position in its motion stating:

> The basic problem, as the Commission understood, is that DCPP's only interest that is even arguably unique and not adequately represented (its proposal to create a "'municipal, not-for-profit, public utility district'" in the District by acquiring PHI's DC-based assets, in an ill-defined and hypothetical transaction) is far outside this proceeding's scope (which is limited to considering whether the "'Settlement Agreement . . . is in the public interest'").[74]

The Joint Applicants assert, "DCPP principally attempts a sleight of hand: It chronicles at length the 'evidence and argument' it wishes to present, based on its asserted (but unsupported) expertise, in the event intervenor status were granted."[75] However, the Joint Applicants maintain, "[t]he Commission's precedent is clear that the touchstone for intervention is a qualifying *interest*. A desire to present *argument* is simply insufficient; . . . DCPP's disregard of this basic principle renders irrelevant the vast majority of its lengthy Motion."[76]

25. Turning to the two instances where "DCPP even purport[s] to identify with specificity any error in the Commission's finding," the Joint Applicants first point out the DCPP's "interest by virtue of having an 'office in the District' that 'uses electricity'" has been rejected by this Commission and affirmed by the Court of Appels.[77] Next, the Joint Applicants challenge "DCPP claims that its wish to pursue its 'not-for-profit . . . Grid Operator model' is broader than, and 'independent of,' its proposed 'creation of a public utility through the divestiture discussion in Paragraph 107' of the Settlement Agreement" because DCPP "cannot

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[72] *Formal Case No. 1119*, Joint Applicants' Response at 4, citing *Formal Case No. 1119*, Order No. 18011, ¶ 22, rel. October 28, 2015.

[73] *Formal Case No. 1119*, Joint Applicants' Response at 4, citing *Formal Case No. 1119*, Order No. 18018, ¶ 31, rel. October 30, 2015.

[74] *Formal Case No. 1119*, Joint Applicants' Response at 4, citing *Formal Case No. 1119*, Order No. 18018, ¶ 31, rel. October 30, 2015. Footnote omitted.

[75] *Formal Case No. 1119*, Joint Applicants' Response at 5.

[76] *Formal Case No. 1119*, Joint Applicants' Response at 5, citing *Formal Case No. 1119*, Order No. 17597, ¶ 11, rel. August 22, 2014.

[77] *Formal Case No. 1119*, Joint Applicants' Response at 5, citing *Formal Case Nos. 1116, 1121*, Order No. 17666, ¶ 11, rel. October 12-13, 2014; *Rhode Island M Assocs. v. PSC*, 117 A.3d 582 (D.C. 2015).

seek reconsideration simply because it now says that its own 'conclusory' Motion failed to adequately explain its interests."[78] The Joint Applicants conclude that "this waived argument still does not remedy the basic flaw in DCPP's request: pursuing *any* aspect of its proposed model would require changes in the ownership or operation of electricity service in the District, a fact DCPP does not and cannot deny. Such changes are far outside this proceeding's scope and contingent on myriad future events."[79]

26. The Joint Applicants assert that the Commission should reject DCPP's claimed interest in "representing the interests of ratepayers" because intervenors must "identify their *own* 'substantial interest' in a proceeding" because "[n]othing in the Commission's rules permits private individuals and entities to self-deputize themselves as representatives of ratepayers generally," since OPC is designated by statute to represent such interests.[80] Further, the Joint Applicants assert, "the choice of [the District Government] and OPC to settle does not create a need for someone else to present "evidence and argument" because "in fact, DCG and OPC signed the Agreement precisely because their independent review persuaded them that it was in the public interest."[81]

27. The Joint Applicants challenge "where DCPP takes issue with the Commission's characterization of its acquisition proposal as 'outside the scope of this proceeding' on the ground that it is 'axiomatic' that 'without considering [such] alternatives . . . the Commission cannot assess whether the revised acquisition proposal . . . is in the public interest.'"[82] The Joint Applicants state, "[w]hat DCPP says is "axiomatic" is not even true" because "[t]he Commission is not considering whether it should instead order the acquisition of PHI's DC-based assets pursuant to DCPP's hypothetical and undefined proposal (which it would lack authority to do in any event)." In support, the Joint Applicants cite decisions in Maryland, Vermont, and Texas where commissions "rejected attempts to inject even genuine alternative transactions into proceedings."[83] The Joint Applicants reject as "simply wrong" DCPP's argument "that the Commission's decision here will foreclose DCPP's alternative 'forever' or 'in perpetuity'" because "[n]othing in the Commission's approval would prevent DCPP from pursuing voluntary negotiation to acquire PHI's DC-based assets."[84]

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78 *Formal Case No. 1119*, Joint Applicants' Response at 6. (Citation Omitted).

79 *Formal Case No. 1119*, Joint Applicants' Response at 6. (Citation Omitted).

80 *Formal Case No. 1119*, Joint Applicants' Response at 6-7, citing D.C. Code § 34-804 (d).

81 *Formal Case No. 1119*, Joint Applicants' Response at 11-12.

82 *Formal Case No. 1119*, Joint Applicants' Response at 7.

83 *Formal Case No. 1119*, Joint Applicants' Response at 7, citing *See, e.g., In the Matter of the Current & Future Fin. Condition of Baltimore Gas & Elec. Co.*, Case No. 9173, Order No. 82986, 2009 WL 8588888, at *17 (Md. P.S.C. Dec. 1, 2009); *In re Transcanada Hydro Ne. Inc.*, Order No. 7047, 2005 WL 1860325, at *17 (Vt. P.S.B. June 6, 2005); *Joint Report & Application of Sharyland Utilities et al.*, Dkt. No. 473-10-3124, Order No. 37990, 2010 WL 2129560, at *8 (Tex. P.U.C. May 10, 2010).

84 *Formal Case No. 1119*, Joint Applicants' Response at 8.

28. The Joint Applicants assert that "[t]he case law DCPP invokes undermines, rather than supports, its position." First, the Joint Applicants state that "*Scenic Hudson* stands for the proposition that an agency with a 'statutory duty' to 'consider[] alternative plans' may act unlawfully when it fails to consider 'feasible alternatives' that would be foreclosed by the original plan."[85] The Joint Applicants contend that "This case is the *opposite*: This Commission's statutory review does not extend to considering DCPP's proposed alternative (but only the "proposed Merger" and the status quo); DCPP's proposal is not "feasible" (but is purely speculative); and any decision the Commission issues here will not foreclose DCPP's proposal (which it may continue to pursue)."[86] Second, regarding *Motor Vehicle Manufacturers*, the Joint Applicants state "the Supreme Court *does not* 'require an agency to consider all policy alternatives in reaching decision.' The Court found error because, and only because, the proposed alternative was "within the ambit of the existing" proceeding."[87]

29. The Joint Applicants present additional arguments: (1) rebutting DCPP's contention that the Settlement Agreement "transforms" this proceeding into a rate case because of the potential to create a regulatory asset;[88] (2) that DCPP's concerns about the Settlement Agreement's connections with distributed generation and microgrids are currently represented by non-settling parties;[89] (3) that DCPP draws the wrong inference from the District Government's and OPC's support of the Settlement Agreement as those two parties "signed the Agreement precisely because their independent review persuaded them that it was in the public interest;"[90] and (4) DCPP's "desire to present evidence and argument is insufficient to justify intervention."[91]

IV. DISCUSSION

30. D.C. Code § 34-604(b) states in pertinent part:

> Any public utility or any other person or corporation affected by any final order or decision of the Commission may, within 30 days after the publication thereof, file with the Commission an application in writing requesting a reconsideration of the matters

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85 *Formal Case No. 1119*, Joint Applicants' Response at 8, citing *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 617, 620 (2d Cir. 1965).

86 *Formal Case No. 1119*, Joint Applicants' Response at 8. (Citation Omitted) (emphasis in original).

87 *Formal Case No. 1119*, Joint Applicants' Response at 8-9, citing *Motor Vehicle Manufacturers Ass'n of United States, Inc. v. State Farm Mutual Automobile Insurance Co.*, 463 U.S. 29, 51 (1983).

88 *Formal Case No. 1119*, Joint Applicants' Response at 10-11.

89 *Formal Case No. 1119*, Joint Applicants' Response at 12.

90 *Formal Case No. 1119*, Joint Applicants' Response at 12.

91 *Formal Case No. 1119*, Joint Applicants' Response at 12.

> involved, and stating specifically the errors claimed as grounds for such reconsideration.[92]

In its construction of D.C. Code § 34-604(b), the Commission has held that the purpose of an application for reconsideration is to identify errors of law or fact in the Commission's order so that they can be corrected.[93] The Commission's rules also require that an application for reconsideration "shall set forth specifically the grounds on which the applicant considers the order or decision of the Commission to be unlawful or erroneous."[94] The Commission has also held in various cases that an application for reconsideration is not a vehicle for the losing party to rehash arguments previously considered and rejected, nor is it an opportunity to raise new issues and arguments that, with due diligence, could have been raised earlier in the proceeding.[95]

31. In Order No. 18018, we discussed the standards for intervention in a Commission proceeding as follows:

> As a general matter our rules governing settlement proceedings in 15 DCMR §§ 130.1–130.17 make no provision for participation in settlement proceedings by non-parties to the case, and neither DCPP nor WGL Energy offered any authority allowing their participation in the settlement proceedings other than the Commission's standard intervention rules. Section 106.1 of the Commission's regulations, 15 DCMR § 106.1, governs intervention in Commission proceedings.
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> * * *
>
> Intervention is not a matter of right. Instead, pursuant to Section 106.5, intervention is entirely within the discretion of the Commission. In determining whether intervention is appropriate in a particular case, we are guided by the same practical and equitable concerns as courts and will permit intervention if the petitioner demonstrates that intervention is necessary to protect a substantial interest. In Order No. 17597, the Commission explained that "In the context of this merger proceeding, which involves companies that operate across a wide geographical area

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92 D.C. Code § 34-604 (2015).

93 *See Formal Case No. 1103, In the Matter of the Application of the Potomac Electric Power Company for Authority to Increase Existing Retail Rates and Charges for Electric Distribution Service,* Order No. 17539 ¶ 4, rel. July 10, 2014, construing D.C. Code § 34-604(b) (2001).

94 See 15 DCMR § 140.2 (June 25, 1982).

95 *See Formal Case No. 1093, In the Matter of the Investigation Into the Reasonableness of Washington Gas Light Company's Existing Rates and Charges for Gas Service,* Order No. 16894, ¶ 3, rel. September 7, 2012; and *Formal Case No. 977, In the Matter of the Investigation into the Quality of Service of Washington Gas Light Company, District of Columbia Division, in the District of Columbia,* Order No. 15129, ¶ 8, rel. November 26, 2008.

> along with our local distribution company, we have concluded that an interested person seeking intervenor status must demonstrate that its substantial interest is related to issues within the authority of this Commission within the District of Columbia." Further, in reviewing motions to file out of time the Commission looks to see if the proponent of the motion provided good cause and if granting the motion would be reasonable, or would not prejudice any party to the proceeding.[96]

32. Following that discussion, we concluded:

> DCPP avers in a conclusory fashion in its Motion to Intervene that it has a significant interest in the outcome of this proceeding. To the extent that DCPP articulates a substantial interest, DCPP appears to be advocating for "the creation of a public utility (municipal, not-for-profit, public utility district) in the District of Columbia." DCPP sees the Commission's review of the Settlement Agreement as linked to the creation of a public utility through the divestiture discussion in Paragraph 107 of the Settlement Agreement, which is part of the Agreement's ring-fencing provisions. The expansion of the Commission's review of the Settlement Agreement, as proposed by DCPP is contrary to Commission Rule 106.7, which requires express Commission approval for an intervention to "chang[e] or broaden[ ] the issues in the proceeding." As the Commission states in Order No. 18011, "[we] will reopen the record in *Formal Case No. 1119* solely for the very limited purpose of considering whether the Settlement Agreement filed by the Settling Parties is in the public interest." Therefore, given that DCPP's interests concern matters that are outside the scope of this proceeding, and due to the limited nature for which this record has been reopened, the Commission denies DCPP's Motion to Intervene.[97]

33. While acknowledging that the Commission's finding that its conclusory two-page Motion to Intervene failed to identify the required significant interest in the outcome of the proceeding, DCPP's Motion for Reconsideration does not show any error in that finding. In fact, DCPP's Motion for Reconsideration does not establish any error of law or fact, but instead devotes the majority of its 30 page Motion outlining its unique expertise and the arguments it would raise if granted intervention. DCPP chronicles at length the "evidence and argument" it wishes to present based on its asserted expertise in the event intervenor status were granted,[98] but, as asserted by the Joint Applicants, "that puts the cart before the horse."[99] The

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96 *Formal Case No. 1119*, Order No. 18018, ¶ 21 (footnotes omitted).

97 *Formal Case No. 1119*, Order No. 18018, ¶ 32 (footnotes omitted).

98 *See, e.g.*, *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 5-6.

99 *Formal Case No.* 1119, Joint Applicants' Response in Opposition at 5.

Commission's precedent is clear that the touchstone for intervention is a substantial interest in the effect of a proceeding in the District of Columbia.[100] A desire to present argument is simply insufficient; and indeed, in this very proceeding, the Commission has already denied similar requests to intervene based on asserted expertise.[101] DCPP's disregard of this basic principle renders irrelevant the vast majority of its lengthy Motion.

34. In the few instances DCPP's 30-page Motion attempts to identify with specificity any error in the Commission's finding that it lacks the requisite interest, its arguments prove to be meritless. First, DCPP asserts that it's "interests . . . are far broader than those that are suggested in" the Commission's decision.[102] DCPP states that it has an interest by virtue of having an "office in the District" that "uses electricity."[103] However, in a recent Court of Appeals decision involving a similar intervention argument, the Court, in response to the Petitioner's argument that "it had a "substantial interest [to intervene] because, as a customer of Pepco, it would have to pay the surcharge approved by the Commission," stated:

> There is substantial force to this argument. . . . But the Commission's decision did not rest solely on a conclusion that Rhode Island lacked a substantial interest in the proceeding.
>
> The Commission clarified the basis of its decision in the order denying reconsideration, explaining that "[e]ven if a petitioner shows a substantial interest, granting intervention is still within the Commission's discretion." Rhode Island had not shown that it had a perspective so unique that only party status would allow it to have its view adequately represented.[104]

In that case, the Court of Appeals affirmed the Commission's rejection of a nearly identical motion, where the proposed intervenor failed to identify anything more than its interest as a commercial ratepayer. Here, the Commission denied DCPP's original Motion to Intervene not only due to its failure to allege a substantial interest entitling it to intervention, but also because its asserted interests were outside the scope of the proceeding.[105] Moreover, DCPP cannot seek reconsideration on its newly raised argument that it has an office in the District and uses electricity because it failed to assert this argument in its original Motion to Intervene, and, consequently, runs afoul of Commission and Court precedent that a motion for reconsideration is

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100 *Formal Case No.* 1119, Order No. 17597, rel. August 22, 2014 ("Order No. 17597"), ¶ 11.

101 *Formal Case No.* 1119, Order No. 17597, ¶¶ 31, 33.

102 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 10.

103 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 9.

104 *Rhode Island & M Assocs. v. PSC*, Nos. 14-AA-1372 & 14-AA-1373, slip op. at 3 (D.C. June 22, 2015) (117 A.3d 582).

105 *Formal Case No. 1119*, Order No. 18018, ¶ 32.

not an opportunity to raise new issues and arguments that, with due diligence, could have been raised earlier in the proceeding.[106]

35. Second, DCPP claims that its wish to pursue its "not-for-profit . . . Grid Operator model" is broader than, and "independent of," its proposed "creation of a public utility through the divestiture discussion in Paragraph 107" of the Settlement Agreement.[107] The Commission linked DCPP's purported interest to the Settlement Agreement's divestiture provision because that is what DCPP said in its Motion to Intervene. DCPP cannot seek reconsideration simply because it now says that its own "conclusory" Motion failed to adequately explain its interests. In any event, this waived argument still does not remedy the basic flaw in DCPP's request that pursuing any aspect of its proposed model would require changes in the ownership or operation of electricity service in the District, a subject far outside this proceeding's scope and contingent on myriad future events. DCPP is not entitled to intervene based on interests that are irrelevant and speculative in the context of this case.

36. Third, DCPP claims an interest in "representing the interests of ratepayers."[108] However, the Commission has properly required that proposed intervenors identify their own "substantial interest" in the proceeding.[109] Nothing in the Commission's rules permits private individuals and entities to self-deputize themselves as representatives of ratepayers generally. It is the Office of People's Counsel ("OPC") that has been statutorily authorized to represent the people of the District of Columbia in proceedings before the Commission involving the interests of users of the products of or services furnished by public utilities under the jurisdiction of the Commission.[110]

37. Finally, DCPP purports to identify an error in the Commission's characterization of DCPP's acquisition proposal as "outside the scope of this proceeding" on the ground that it is "axiomatic" that "without considering [such] alternatives . . . the Commission cannot assess whether the revised acquisition proposal . . . is in the public interest."[111] However, the only issue now before the Commission is whether the Settlement Agreement is in the public interest, or not. The Commission is not considering whether it should instead order the acquisition of PHI's DC-based assets pursuant to DCPP's hypothetical proposal. We note, as referenced by the Joint Applicants, "regulators across the country have rejected attempts to inject even *genuine* alternative transactions into similar proceedings."[112] Moreover, the case law DCPP invokes

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106 *See Rhode Island & M Assocs. v. PSC*, Nos. 14-AA-1372 & 14-AA-1373, slip op. at 4 (D.C. June 22, 2015) (117 A.3d 582),.citing *In re Washington Gas Light Co.*, PSC Formal Case No. 977, Order No. 15129 at 3 (Nov. 26, 2008); and *Dist. No. 1 – Pac. Coast Dist. V. Travelers Cas. & Sur. Co.*, 782 A.2d 260, 278-79 (D.C. 2001).

107 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 9-10.

108 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 10.

109 *Formal Case No. 1119*, Order No. 18018, ¶ 32; Order No. 17597, ¶ 11.

110 D.C. Code § 34-804.

111 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 11.

112 *Formal Case No.* 1119, Joint Applicants' Response in Opposition at 7.citing *In the Matter of the Current & Future Fin. Condition of Baltimore Gas & Elec. Co.*, Case No. 9173, Order No. 82986, 2009 WL 8588888,

undermines, rather than supports, its position. *Scenic Hudson* stands for the proposition that an agency with a "statutory duty" to "consider[] alternative plans" may act unlawfully when it fails to consider "feasible alternatives" that would be foreclosed by the original plan.[113] As the Joint Applicants point out, this case is the opposite: the Commission's statutory review does not extend to considering DCPP's proposed alternative, but only whether the Proposed Merger as set forth within the four corners of the Settlement Agreement is in the public interest.[114] Without getting into the details of the other cases cited by DCPP in support of its contention that the Commission is obligated to consider alternative merger proposals, we note that those cases are *inapposite* here and do not support any conclusion that we must give credence to DCPP's speculative alternative proposals.[115]

38. Two additional arguments made by DCPP which are also meritless deserve brief mention. First, its argument that the Settlement Agreement improperly results in a "rate increase outside of a Rate Case"[116] is just wrong. No change in rates can occur without Commission approval in a rate case proceeding, and this case does not involve any changes in rates. We also held from the beginning of the case that the merger proceeding is not a rate case.[117] Second, DCPP's argument that the District Government's and OPC's choice to join in the Settlement Agreement creates a need for someone else to present evidence and argument on behalf of the public interest[118] is baseless. As appropriately stated by the Joint Applicants:

> Indeed, DCPP draws exactly the wrong inference from the pledge of DCG and OPC to support the Settlement Agreement: DCPP claims that this provision deprives DCG and OPC of "independent and impartial judgment" concerning the Settlement Agreement, but in fact, DCG and OPC signed the Agreement precisely because their independent review persuaded them that it was in the public interest.[119]

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at *17 (Md. P.S.C. Dec. 1, 2009) ("It is not our place . . . to weigh [the Transaction] against alternative deals . . . ."); *In re Transcanada Hydro Ne. Inc.*, Order No. 7047, 2005 WL 1860325, at *17 (Vt. P.S.B. June 6, 2005) ("Our task is to rule only on the merits of the proposed transactions before us and not to determine if there could have been another proposal that would have been superior to the one which has been presented."); *Joint Report & Application of Sharyland Utilities et al.*, Dkt. No. 473-10-3124, Order No. 37990, 2010 WL 2129560, at *8 (Tex. P.U.C. May 10, 2010) ("The Commission may not consider *alternative business transactions*—for example, whether [the applicant utility] should merge with another utility instead.") (emphasis in the original).

113 *Scenic Hudson Pres. Conference v. FPC*, 354 F.2d 608, 617, 620 (2d Cir. 1965).

114 *Formal Case No. 1119*, Order No. 18011, ¶¶ 57, 61.

115 See the arguments and cases cited by the Joint Applicants in their Response in Opposition at 8-9.

116 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 6.

117 *Formal Case No. 1119*, Order No. 17597, ¶¶ 69-86, 144.

118 *Formal Case No. 1119*, DCPP's Motion for Reconsideration at 7.

119 *Formal Case No.* 1119, Joint Applicants' Response in Opposition at 12.

The District Government and OPC do not lose their authority to represent their clients, the public, just because they enter into a settlement agreement in a proceeding.

THEREFORE, IT IS ORDERED THAT:

39. The DC Public Power's Motion for Reconsideration and Renewed Motion to Intervene is **DENIED**.

A TRUE COPY:

BY DIRECTION OF THE COMMISSION:

CHIEF CLERK:

BRINDA WESTBROOK-SEDGWICK
COMMISSION SECRETARY